

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>BRETT LYNN</b>	)	
Claimant	)	
VS.	)	
	)	
<b>FOCUS PACKAGING, INC.</b>	)	Docket No. 211,074
Respondent	)	
AND	)	
	)	
<b>ST. PAUL FIRE &amp; MARINE INSURANCE COMPANY</b>	)	
Insurance Carrier	)	

**ORDER**

Claimant appealed the December 5, 1996, Award of Administrative Law Judge Robert H. Foerschler.

**APPEARANCES**

Claimant appeared by his attorney, John G. O'Connor of Kansas City, Kansas. The respondent and its insurance carrier appeared by their attorney, D'Ambra M. Howard of Overland Park, Kansas. There were no other appearance.

**RECORD AND STIPULATIONS**

The Appeals Board has considered the record and adopted the stipulations listed in the Award.

**ISSUES**

The Administrative Law Judge denied claimant's request for workers compensation benefits finding claimant had failed to prove he suffered an accidental injury that arose out of and in the course of his employment with the respondent. That is the only issue before the Appeals Board for review.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record and considering the briefs of the parties, the Appeals Board finds as follows:

On November 27, 1995, the date of claimant's alleged work-related accident, claimant had been employed by the respondent for three and one-half years as a utility person primarily with the responsibility of driving a fork lift. Claimant alleged he fractured his right hand when he hit the side of a paper baler as he was forcibly smashing scrap paper into the baler. Claimant notified his supervisor of the injury approximately two hours after the accident. Respondent sent claimant for medical treatment to the Occupational Medicine Associates in Kansas City, Kansas. Claimant was seen by Dr. Foster who found claimant to have a swollen, discolored right hand. It was Dr. Foster's impression that claimant had fractured his fifth metacarpal on the right hand. Dr. Foster referred claimant to Ben M. Kozikowski, M.D., an orthopedic surgeon in Shawnee Mission, Kansas. Dr. Kozikowski saw claimant the next day, November 28, 1995, and diagnosed a fracture of the right fifth metacarpal with displacement. He scheduled claimant for surgery on November 29, 1995, at the Shawnee Mission Medical Center. The doctor performed an open reduction and internal fixation, finding extreme comminution of the fifth metacarpal head.

The claimant gave consistent histories to both Dr. Foster and Dr. Kozikowski indicating he injured his right hand when he hit the side of the paper baler. Dr. Kozikowski followed the claimant until March 18, 1996, when the claimant was released to return to regular work without restrictions. The respondent voluntarily paid claimant his regular salary while he was off work and also voluntarily provided and paid for medical treatment for claimant's injured hand. Following his return to work, claimant was terminated by the respondent after working only one week in March 1996. Claimant testified the respondent notified him that the reason he was terminated was because he was not a team player.

After his termination, claimant then filed a claim for permanent disability compensation benefits as a result of his hand injury. At that time, Shawn Downs, another employee of the respondent, came forward and notified the respondent that he and the claimant had a fight on Wednesday, November 22, 1995, five days before claimant alleged he had injured his hand while working for the respondent. Mr. Downs testified claimant injured his hand during the fight and not at work. Claimant acknowledged a fight had taken place between him and Mr. Downs but denied his hand was injured during the fight.

The Administrative Law Judge denied claimant's request for compensation benefits finding claimant failed to prove he injured his hand while working for the respondent on November 27, 1995. The Administrative Law Judge concluded the greater weight of the credible evidence contained in the record supported a finding that claimant's hand was injured during the fight with Mr. Downs on November 22, 1995, and not while performing his job duties with the respondent. The Appeals Board agrees with the Administrative Law Judge and thus affirms his Award denying claimant's request for workers compensation benefits.

The Appeals Board finds the Administrative Law Judge's conclusion is supported by the testimony of the treating physician Dr. Kozikowski. Dr. Kozikowski testified during his deposition that it was his opinion it was unlikely a single blow the claimant described as the cause of his right hand injury could have caused the extreme fragmentation of the metacarpal that was found during the surgery. Additionally, Dr. Kozikowski testified he found, during his first examination of claimant, extensive swelling in claimant's right hand. It was the doctor's opinion such extensive swelling would likely have taken longer to develop than an injury that occurred only the day before.

The outcome of this case hinges substantially on the credibility of claimant's testimony. The Administrative Law Judge had the opportunity to observe the claimant testify in person and to judge his credibility. Therefore, the Appeals Board considers it appropriate to give some deference to the Administrative Law Judge's judgement in regard to claimant's credibility. The Appeals Board concludes that since the Administrative Law Judge found claimant's right hand injury did not occur at work, he had to question the truthfulness of claimant's testimony.

The Appeals Board finds the findings and conclusions of the Administrative Law Judge contained in his Award are both accurate and appropriate. The Appeals Board adopts those findings and conclusions to the extent they are not inconsistent with the above.

#### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award dated December 5, 1996, entered by Administrative Law Judge Robert H. Foerschler that denied claimant compensation benefits should be, and is hereby, affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of March 1997.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: John G. O'Connor, Kansas City, KS  
D'Ambra M. Howard, Overland Park, KS

Robert H. Foerschler, Administrative Law Judge  
Philip S. Harness, Director